

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., <i>et al.</i> ,	)	
	)	
Defendants.	)	

**STATE OF OKLAHOMA'S REPLY IN FURTHER SUPPORT OF  
ITS "MOTION FOR RECONSIDERATION OF THE  
COURT'S SEPTEMBER 4, 2009 MINUTE ORDER [DKT #2596]"**

The State of Oklahoma ("the State") respectfully submits the following reply in further support of its "Motion for Reconsideration of the Court's September 4, 2009 Minute Order [DKT #2596]" granting in part "Defendants' Joint Motion *in Limine* to Preclude Plaintiffs [sic] from Attributing to Poultry Defendants Any Evidence Related to the Use of Poultry Litter by Cattle Farmers and Other Independent Third Parties," DKT #2407.

**I. Reconsideration of motion *in limine* rulings in general is appropriate**

Defendants are critical of the State for seeking reconsideration of the Court's ruling on this motion *in limine*. Reconsideration, however, is the proper course of action for challenging rulings that a litigant believes are in error. Moreover, the State's Motion is not a traditional motion for reconsideration brought pursuant to the standard of reconsideration set forth in *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). Rather, the State's Motion is brought pursuant to the permissive standard set forth in *Bynum v. Cavalry Portfolio Services, L.L.C.*, 2006 U.S. Dist. LEXIS 21290, at \*14-15 (N.D. Okla. Apr. 13, 2006) ("all rulings *in limine* are, by their very nature, preliminary, and the court may change its ruling

at any time for whatever reason it deems appropriate") (citing *Jones v. Stotts*, 59 F.3d 143, 146 (10th Cir. 1995)).

**II. Reconsideration of this Court's motion *in limine* ruling concerning the applicability of Restatement (Second) of Torts, § 427B under the State's common law claims with respect to transfers of poultry waste to third persons for land application on non-grower / non-integrator property is warranted<sup>1</sup>**

Defendants characterize the State's Motion as arguing that the Restatement (Second) of Torts, § 427B applies outside the context of where a principal hires an independent contractor. *See* Defendants' Response, p. 4. Defendants' characterization is inaccurate. The State's Motion focuses squarely on the context of where a principal has hired an independent contractor. Specifically, it focuses on whether the principal is liable under Restatement (Second) of Torts, § 427B when, in the ordinary course of performing the contracted-for work in the usual or prescribed manner, a trespass or nuisance is likely to result from the contractor's performance of that work. As explained in detail in the State's Motion, that is a fact-specific determination turning on: (1) what the contracted-for "work" is,<sup>2</sup> (2) what the ordinary course of performing

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<sup>1</sup> It is important to be clear on the scope of Defendants' Motion *in Limine*. In their Motion, Defendants did not move to preclude the State from attributing to Defendants any evidence related to the land application of poultry waste by Defendants, by persons applying poultry waste on Defendants' land, by contract growers, and / or by persons applying poultry waste on contract growers' land. *See* DKT #2407. Additionally, it bears repeating that with respect to the State's RCRA claim, the Court denied Defendants' Motion to preclude the State from attributing to Defendants use of poultry waste by third persons. *See* Sept. 4, 2009 Transcript, pp. 239-40. The Court reserved ruling with respect to whether Defendants could be liable under the State's 27A Okla. Stat. § 2-6-105 claim for third person transfers for land application on non-grower / non-integrator property. *See* Sept. 4, 2009 Transcript, pp. 243-44.

With respect to the State's common law claims, Defendants' Motion did not address the State's theories under which Defendants may be held liable for the acts of their growers on other common law principles of vicarious liability (*e.g.*, principal-agent principles, employer-employee principles).

<sup>2</sup> The "work" is the growing of poultry. Poultry waste necessarily follows from the growing of poultry. The removal and disposal -- including the arrangement for the disposal -- of

that "work" in the usual or prescribed manner is,<sup>3</sup> and (3) whether, when that "work" is performed in the usual or prescribed manner, it is known or knowable to the principal that a trespass or nuisance is likely to result.<sup>4</sup> The crux of the issue is one of correctly defining "the work" -- a question that cannot be answered without reference to a developed factual record. Here, therefore, the State submits that the Court erred in that part of its September 4, 2009 ruling that the language of Restatement (Second) of Torts, § 427B cannot, as a matter of law, extend to land application of poultry waste generated by Defendants' birds and transferred to third persons for land application on non-grower / non-integrator property.<sup>5</sup> The State respectfully submits that the Court should have awaited the development of a factual record to determine whether such transfers are, as the State alleges, a part of "the work" of poultry growing such that Restatement (Second) of Torts, § 427B could and would apply.<sup>6</sup>

Additionally, Defendants are simply incorrect in their continued assertion that Restatement (Second) of Torts, § 427B-type liability has not been adopted in Oklahoma. *See*

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this poultry waste is part and parcel of the ordinary course of the work of growing poultry performed by the poultry grower.

<sup>3</sup> Because of the enormous amounts of poultry waste generated in growing poultry and the fact that many growers' lands are over-saturated with phosphorus from previous land disposals of poultry waste, the work of disposing of poultry waste -- part of the ordinary course of growing poultry in the usual or prescribed manner -- plainly includes transferring some portion of such waste to third persons for land application on non-grower / non-integrator property.

<sup>4</sup> It is known or knowable that this transferred poultry waste will be disposed of in the IRW in the same manner as other poultry waste in the IRW, and that such disposal can and does result in runoff and leaching of phosphorus and bacteria into the waters of the State, thereby causing or likely causing a nuisance and / or trespass.

<sup>5</sup> There has been, of course, no contention by Defendants that all poultry waste in the IRW either is presently or has historically been transferred to third persons for land application on non-grower / non-integrator property.

<sup>6</sup> This is doubly so where, as is the case here, the matter is not being tried to a jury.

Defendants' Response, pp. 5-6. The Oklahoma Supreme Court clearly has recognized such liability. *See Tankersley v. Webster*, 243 P. 745, 747 (Okla. 1925) (acknowledging the rule that "where the performance of [a] contract, in the ordinary mode of doing the work, necessarily or naturally results in producing the defect or nuisance which caused the injury, then the employer is subject to the same liability as the contractor"). The *Tankersley* court simply found that such Restatement (Second) of Torts, § 427B-type liability was inapplicable to the facts at hand. *Id.* at 747-48. Underscoring that Restatement (Second) of Torts, § 427B-type liability is mainstream Oklahoma law, Chief Judge Claire Eagan in the *City of Tulsa* case relied upon *Tankersley* in finding such liability against Defendants. *See City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1296-97 (N.D. Okla. 2003), *vacated in connection with settlement*.

The federal common law of nuisance -- applicable to Defendants' conduct in Arkansas, *see, e.g., Connecticut v. American Electric Power Co., Inc.*, 2009 U.S. App. LEXIS 20873 (2d Cir. Sept. 21, 2009) -- relies upon Restatement principles and thus would apply Restatement (Second) of Torts, § 427B-type liability. *See id.* at \*40 ("as a general matter, the Supreme Court and this Court have often turned to the Restatement (Second) of Torts for assistance in developing standards in a variety of tort cases"). Thus, Defendants' nuisance-causing conduct in Arkansas is also governed by the Restatement (Second) of Torts, § 427B.

Defendants' restrictive reading of "work" under Restatement (Second) of Torts, § 427B is likewise unavailing. As discussed above and in the State's Motion, the term "work" as used in Restatement (Second) of Torts, § 427B cannot be understood without reference to the facts and a concomitant development of a factual record.

Finally, Defendants' efforts to analogize the applicability of Restatement (Second) of Torts, § 427B to the State's nuisance claim to a product liability context should not be credited.

In the context of Restatement (Second) of Torts, § 427B, the transfer of poultry waste to third persons for land application on non-grower / non-integrator property must be seen from the perspective of the transferor. Such transfers are not the sale of a product; they are a means of and arrangement for waste disposal. They are a part of the contracted-for work between the integrator and the grower for which the integrator bears liability. Thus, contrary to Defendants' assertion, *see* Defendants' Response, pp. 1-2, the State is not arguing an "unbounded theory of strict product liability." In fact, the State is not arguing product liability theory at all; the State is arguing nuisance theory. While the State does not dispute that Restatement (Second) of Torts, § 427B does have limits, by the same token one cannot manipulate the operation of Restatement (Second) of Torts, § 427B by simply adding intermediaries to perform the contracted-for work in order to evade liability.

**III. Defendants may be liable under 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1 for poultry waste that is transferred to third persons for land application on non-grower / non-integrator property**

Although not a part of the State's Motion, in their Response, Defendants have argued that they cannot be liable under 27A Okla. Stat. § 2-6-105 or 2 Okla. Stat. § 2-18.1 for poultry waste that is transferred to third persons for land application on non-grower / non-integrator property.<sup>7</sup> Defendants are incorrect not only for all the reasons set forth in the State's Motion and above, but also because these statutes are intended to reach more broadly than the common law (including Restatement (Second) of Torts, § 427B).

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<sup>7</sup> Acknowledging that "[t]he common law as modified by constitutional and statutory law . . . shall remain in force in aid of the general statutes of Oklahoma," *see* 12 Okla. Stat. § 2, with respect to the State's claims under 27A Okla. Stat. § 2-6-105 or 2 Okla. Stat. § 2-18.1, Defendants do not dispute that they may be held liable for the acts of their growers on common law principles of vicarious liability (*e.g.*, principal-agent principles, employer-employee principles, and Restatement (Second) of Torts, § 427B principles). *See* Defendants' Response, pp. 11-15.

With respect to 27A Okla. Stat. § 2-6-105, for instance, 27A Okla. Stat. § 2-6-104 provides that "[i]t is the purpose of this article [*i.e.*, the article containing 27A Okla. Stat. § 2-6-105] to provide additional and cumulative remedies to prevent, abate and control the pollution of the waters of the state." (Emphasis added.) Underscoring the intended expansive reach of the Oklahoma Environmental Quality Code as a whole, 27A Okla. Stat. § 2-3-506(A) similarly provides that "[i]t is the purpose of this Code to provide additional and cumulative remedies to prevent, abate and control pollution." (Emphasis added.) Both of these provisions are clear signals that 27A Okla. Stat. § 2-6-105 is intended to reach beyond the traditional bounds of the common law.

Section 2-6-105(A) of title 27A of the Oklahoma Statutes provides three broad grounds for imposing liability. They are:

- (1) "It shall be unlawful for any person to cause pollution of any waters of the state . . . ."
- (2) "It shall be unlawful for any person . . . to place . . . any wastes in a location where they are likely to cause pollution of any . . . waters of the state."
- (3) "It shall be unlawful for any person . . . to . . . cause to be placed any wastes in a location where they are likely to cause pollution of any . . . waters of the state."

27A Okla. Stat. § 2-6-105(A). The sweeping language of these provisions reveals the Oklahoma Legislature's intent that this statutory scheme be liberally construed to reach all actors whose conduct contributes to the pollution or threatened pollution of the waters of the State. *See Burlington N. & Santa Fe Rwy. Co.*, 505 F.3d 1013, 1024 (10th Cir. 2007) ("The primary goal of statutory interpretation is to determine and follow legislative intent. To determine legislative intent, we look at the whole act in light of its general purpose and objective. When interpreting

any statute, we begin with the plain and ordinary meaning of the language employed in the text").

By transferring poultry waste generated by their birds to third persons for land application on non-grower / non-integrator property in the IRW and by allowing their growers to transfer poultry waste generated by their birds to third persons for land application on non-grower / non-integrator property in the IRW, it is foreseeable to Defendants that some portion of the phosphorus and bacteria contained therein can and does run off to the waters of the State. Moreover, it is fully within Defendants' powers not only to refrain from engaging in such transfers themselves, but also to prohibit their growers from engaging in such transfers. Thus, each Defendant is a person "caus[ing] pollution of . . . waters of the state."<sup>8</sup> See 27A Okla. Stat. § 2-6-105(A). Likewise, each Defendant is also a person "caus[ing] to be placed . . . wastes in a location where they are likely to cause pollution of . . . waters of the state."<sup>9</sup> See 27A Okla. Stat. § 2-6-105(A). Not only are they allowing such transfers to occur, which is causing poultry waste

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<sup>8</sup> "Cause" means "a cause which, in a natural and continuous sequence, produces injury and without which the injury would not have happened." See OUJI (Civil) No. 9.6.

<sup>9</sup> Defendants' parsing of the language of 27A Okla. Stat. § 2-6-105(A) is unavailing. See Defendants' Response, pp. 14-15. Specifically, Defendants attempt to read the word "place" in isolation from the word "location" in 27A Okla. Stat. § 2-6-105(A) in an effort to narrow the meaning of "location." For purposes of the State's claim, the term "location" as used in 27A Okla. Stat. § 2-6-105(A) means the Oklahoma portion of the IRW.

Defendants' earlier attempts to parse the definition of "pollution" for purposes of 27A Okla. Stat. § 2-6-105(A) are also unavailing. For purposes of 27A Okla. Stat. § 2-6-105(A), the term "pollution" is broadly defined. It is a two-part, disjunctive definition. See 27A Okla. Stat. § 2-1-102(12). First, "[p]ollution" means the presence in the environment of any substance, contaminant or pollutant, or any other alteration of the physical, chemical or biological properties of the environment . . . ." *Id.* Additionally and alternatively, "[p]ollution" means . . . the release of any liquid, gaseous or solid substance into the environment in quantities which are or will likely create a nuisance or which render or will likely render the environment harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, or to property[.]" *Id.* (emphasis added).

to be placed in a location (the IRW) where it is likely to cause pollution, but also more fundamentally Defendants are annually placing millions of their birds in the Oklahoma portion of the IRW (together with the phosphorus-laden feed their birds consume), without providing for the safe handling and disposal of the poultry waste generated by these birds. This, too, is causing poultry waste to be placed in a location (the IRW) where it is likely to cause pollution.

A similar analysis pertains with respect to 2 Okla. Stat. § 2-18.1. Section 2-18.1(A) of title 2 of the Oklahoma Statutes provides that "[i]t shall be unlawful and a violation of the Oklahoma Agricultural Code for any person to cause pollution of any . . . waters of the state by persons which are subject to the jurisdiction of the Oklahoma Department of Agriculture, Food, and Forestry pursuant to the Oklahoma Environmental Quality Act." As above, by transferring poultry waste generated by their birds to third persons for land application on non-grower / non-integrator property in the IRW and by allowing their growers to transfer poultry waste generated by their birds to third persons for land application on non-grower / non-integrator property in the IRW, it is foreseeable to Defendants that some portion of the phosphorus and bacteria contained therein can and will runoff to the waters of the State. Likewise, as above, it is fully within Defendants' powers not to engage in such transfers themselves and to prohibit their growers from engaging in such transfers. Thus, each Defendant is a person "caus[ing] pollution of . . . waters of the state." *See* 2 Okla. Stat. § 2-18.1.

#### **IV. Conclusion**

That part of the Court's September 4, 2009 order ruling that the language of Restatement (Second) of Torts, § 427B cannot, as a matter of law, extend to the land application of poultry waste transferred to third persons for land application on non-grower / non-integrator property should be vacated on reconsideration. The issue should be revisited at the conclusion of trial



once a factual record has been developed, at which time, the State submits, the Court will have the requisite proofs to determine that such transfers are indeed a part of "the work" of poultry growing such that Restatement (Second) of Torts, § 427B applies.

Respectfully Submitted,

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